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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-759

HON. EDWIN EDWARDS, *et al.*,

Appellants,

—v.—

MARSHA B. HEALY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

REPLY TO MEMORANDUM OF APPELLANTS SUGGESTING MOOTNESS

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This case affects the rights of named plaintiffs as individuals and the class of female litigants they represent, persons denied due process of law and equal protection of the laws by a jury service exemption for "women only" mandated by Louisiana Constitution, Art. VII, sec. 41 and presently operative in both civil and criminal cases.

At midnight on December 31, 1974 a new Louisiana Constitution is scheduled to take effect. While the "volunteers only" provision for female jury service is not retained in the text of the new constitution, nothing therein precludes continuation of the same exemption. Article V, sec. 33 of the new Constitution grants the legislature authority to "provide additional qualifications"; further it directs the

Louisiana Supreme Court to "provide by rule for exemption of jurors." No provision to become operative at midnight on December 31, 1974 requires change in the existing system. Significantly, Article I, sec. 3 of the new Constitution flatly proscribes any law discriminating against a person "because of race or religious ideas, beliefs or affiliations"; discrimination based on sex, by contrast, is proscribed only when "unreasonable." 1/ The Louisiana Supreme

1/ Article I, Section 3 provides:

Section 3. Right to Individual Dignity

Section 3. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

See also Article I, Section 12 which provides:

Section 12. Freedom from Discrimination

Section 12. In access to public areas, accommodations, and facilities, every person shall be free from discrimination based on race, religion or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition.

Court has held time and again that the exemption at issue in the instant case is "neither irrational nor discriminatory." See, e.g., State v. Taylor, 282 So.2d 491, 497 (1973); State v. Enloe, 276 So.2d 283 (1973); State v. Curry, 263 So.2d 36 (1972); State v. Daniels, 263 So.2d 859 (1972); State v. Reese, 194 So.2d 279, cert. denied, 389 U.S. 996 (1967); State v. Comeaux, 211 So.2d 820 (1968); State v. Pratt, 233 So.2d 891 (1970); State v. Alexander, 233 So.2d 891 (1970); State v. Sinclair, 245 So.2d 365 (1971); State v. Millsap, 248 So.2d 324 (1971); and State v. Amphy, 249 So.2d 560 (1971).

Voluntary cessation of allegedly illegal activity does not moot a case when the risk of recurrence remains real. United States v. W.T. Grant, 345 U.S. 629, 632 (1953); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 308-310 (1897); Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 43 (1944); Gray v. Sanders, 372 U.S. 368, 376 (1963); United States v. The Concentrated Phosphate Export Ass'n, 393 U.S. 199, 202-203 (1968). A fortiori, a case does not become moot where, as in the case at bar, the unconstitutional practice persists and there is only a prospect of future change. Failure of the Court finally to resolve the merits of this controversy would more than leave the appellants "free to return to . . . old ways"; appellants could continue old ways without interruption. United States v. W.T. Grant, supra at 632. Exacerbating the situation are the divergent interpretations of the supreme federal constitutional requirement by state and federal courts sitting in the

same territorial unit.

Voluntary cessation of contested activity makes a case moot only when it can be determined with assurance that "there is no reasonable expectation that the wrong will be repeated.'" United States v. W.T. Grant, supra at 633. "The burden [of assuring that the wrongful conduct will not recur] is a heavy one." United States v. W.T. Grant, supra at 633; accord, United States v. The Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968). Particularly, "[w]here the practice is deeply rooted and long standing," this Court has not permitted litigation to be derailed absent convincing demonstration that the practice will not be revived. Gray v. Sanders, 372 U.S. 368, 375 (1963); Moore v. Ogilvie, 394 U.S. 814, 816 (1969). See also Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 43 (1944) (case held not moot where employer consistently urged validity of discontinued system of wage computation); Anderson v. City of Albany, 321 F.2d 649, 657 (5th Cir. 1963) (repeal of city segregation ordinances after commencement of suit seeking to enjoin their enforcement did not moot the case, because "[w]hat has been adopted can be repealed, and what has been repealed can be re-adopted"); Jackson v. Bishop, 404 F.2d 571, 575 n. 5 (8th Cir. 1968).

In sum, the status of the instant case as a live "case or controversy" is abundantly supported by federal precedent. The unconstitutional jury exemption is currently in effect; plaintiffs herein, female litigants, remain exposed to juries on which no members of their sex serve. Moreover, any

jury exemption for women only established by the Louisiana Supreme Court in the future will affect the plaintiff class delineated in this action. Boggess v. Berry Corporation, 233 F.2d 389, 390 (9th Cir. 1956); Note, Mootness on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672, 1687 (1970). Additionally, jury selection from a representative cross-section of the community is so basic to our system of justice that an urgent public interest impels resolution of this controversy by the Court. United States v. W.T. Grant, 345 U.S. 629, 632 (1953); Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 516 (1911); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897). See Comment, Twelve Good Persons and True, 9 Harv. Civ. Rts. - Civ. Lib. L. Rev. 561 (1974).

Conclusion

This is a case of actual controversy. The "volunteers only" women's exemption remains in effect and appellants "consistently urge its validity." This case, involving a question of great public importance, meets justiciability requirements and should be adjudicated on the merits.

Respectfully submitted,

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